

SUPREME COURT OF QUEENSLAND

CITATION: *Caprice Property Holdings Pty Ltd v McLeay & Anor* [2013] QCA 125

PARTIES: **CAPRICE PROPERTY HOLDINGS PTY LTD**
ACN 156 054 821
(appellant)
v
**JOHN LEONARD McLEAY &
JULIE ANNE McLEAY**
(respondents)

FILE NO/S: Appeal No 12357 of 2012
SC No 9708 of 2012

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 24 May 2013

DELIVERED AT: Brisbane

HEARING DATE: 15 May 2013

JUDGES: Fraser JA, Boddice and Jackson JJ
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Appeal dismissed.**
2. The appellant pay the respondents' costs of the appeal.

CATCHWORDS: CONVEYANCING – COMPLETION OF CONTRACT – TIME FOR COMPLETION – GENERALLY – where the time of day for settlement was agreed upon – where the seller was unable to complete on that hour for 20 minutes – whether buyer has an obligation to settle

Property Law Act 1974 (Qld), s 62, s 69

Aussie Invest Corporation Pty Ltd v Pulcesia Pty Ltd (2005) 13 VR 168; [2005] VSC 362, considered

Beard v Wratishlaw [1993] 2 Qd R 494, followed

Ex parte Robertson [1983] 1 Qd R 526, followed

Foran v Wight (1989) 168 CLR 385; [1989] HCA 51, followed

Ireland v Leigh [1982] Qd R 145, followed

Jeppesons Road Pty Ltd v Di Domenico & Anor [2005] [QCA 391](#), followed

Lohar Corporation Pty Ltd v Dibu Pty Ltd (1976)
 1 BPR 9177, cited
Lowe v Evans [1989] 1 Qd R 295, distinguished
Mullins v Kelly-Corbett [2010] QCA 354, followed
Ogle v Comboyuro Investments Pty Ltd (1976) 136 CLR 444;
 [1976] HCA 21, cited
Re Ronim Pty Ltd [1992] 2 Qd R 172; [1998] QCA 444,
 considered

COUNSEL: G D Sheahan for the appellant
 A Duffy for the respondents

SOLICITORS: Henry Davis York for the appellant
 Robinson & Robinson for the respondents

- [1] **FRASER JA:** I agree with the reasons for judgment of Jackson J and the orders proposed by his Honour.
- [2] **BODDICE J:** I have read the reasons for judgment of Jackson J. I agree with those reasons and the proposed orders.
- [3] **JACKSON J:** Generally, under a contract for the sale of land and specifically, under a contract in the standard form approved by the REIQ and the Queensland Law Society, 9th edition, the obligations of the seller and the buyer to complete the sale are “dependent, concurrent and reciprocal”¹ obligations. An equivalent formulation is “concurrent and mutually dependent obligations”².
- [4] Thus, under cl 5.3 of the standard terms of contract it is provided that in exchange for payment of the balance price the seller must deliver to the buyer at settlement, *inter alia*, “any instrument necessary to release any Encumbrance over the Property in compliance with the Seller’s obligation in clause 7.2”. Clause 7.2 of the standard terms of contract provides that the property “is sold free of all Encumbrances other than the Title Encumbrances and Tenancies” as defined in the contract.
- [5] Further, cl 5.1(1) of the standard terms and conditions provides that “Settlement must occur between 9am and 5pm on the Settlement Date” and cl 5.1(2) provides that “If the parties do not agree on where settlement is to occur, it must take place in the Place for Settlement at the office of a solicitor or Financial Institution nominated by the Seller, or, if the Seller does not make a nomination, at the land registry office in or nearest to the Place for Settlement”. On page 4 of the contract in the present case, the place for settlement was identified as the Gold Coast.
- [6] Clause 6.1 of the standard terms of contract provides that “Time is of the essence of this contract, **except regarding any agreement between the parties on a time of day for settlement**” (emphasis added).
- [7] Under s 62 of the *Property Law Act* 1974 (Qld) (“PLA”) “Stipulations in contracts, as to time or otherwise, which under rules of equity are not deemed to be or to have become of the essence of the contract, shall be construed and have effect at law under rules of equity”.

¹ See *Beard v Wratishlaw* [1993] 2 Qd R 494 at 502; *Jeppesons Road Pty Ltd v Di Domenico* [2005] QCA 391 at [21].

² See *Foran v Wight* [1989] HCA 51; (1989) 168 CLR 385 at 396, 417, 433, 450 and 455.

- [8] Absent a stipulation making time of the essence, equity did not regard the time for completion of a contract of sale of land to be an essential condition.
- [9] In order to avoid the obligation to complete the contract, a reluctant buyer may by various means seek to scuttle the settlement and thereafter attempt to terminate the contract for the seller's breach in failing to settle on the stipulated essential date. One well known example in Queensland was *Ireland v Leigh*³ where the buyer's solicitors made themselves generally unavailable in the days leading to the agreed date for settlement, as a result of which the seller did not execute or tender an executed stamped memorandum of transfer on the settlement date. In that case, Connolly J said:
- “Now the obligations of vendor and purchaser with respect to completion are plainly concurrent obligations. It follows that the vendor cannot charge the purchaser with breach of contract consisting in her failure to complete ... unless on that date she herself was ready and willing to complete. ... If the purchaser had tendered performance at the office of the vendor's solicitor **at the last moment of the working day** the memorandum of transfer would still have been unexecuted and unstamped.”⁴
(emphasis added)
- [10] That passage recognises what is reflected in cl 6.1 of the standard terms of contract, in the present case, that the time of day for settlement is not usually essential. But it depends on the terms of the contract. In *Ex parte Robertson*⁵, time was essential but no specific provision was made about the time of day for settlement in the contract. The nominated time was 3.30 pm on the settlement date. Earlier in the day, the vendor's solicitors were experiencing difficulty getting the mortgage release documents from the mortgagee. After discussions, at 3.30 pm the vendor's solicitors said they could not settle and nominated 6.00 pm instead. The purchaser who wished to get out of the contract, if possible, tendered a bank cheque at 3.30 pm, refused to attend at 6.00 pm, and terminated at about 4.00 pm. At 6.00 pm the vendor was ready and willing. It was held that “as a matter of convenience, it would almost always be necessary to nominate a time. This does not mean, however, that the fact that one party is unable to settle at that instant means that then and there the other party has a right to rescind”⁶.
- [11] By 1988, when *Lowe v Evans*⁷ was decided, the standard terms of contract provided that “**Completion shall be effected at such time and place as may be agreed upon by the parties.** In the absence of agreement it shall be effected between the hours of 9.00 am and 5.00 pm” (emphasis added). The parties had agreed upon a time and place. Another clause provided that “Time shall in all cases **and in every respect** be deemed to be of the essence of the contract” (emphasis added). McPherson J held that the provision making time of the essence applied to the hour for completion agreed to by the parties, and thereby distinguished *Ex parte Robertson*. The vendor was not ready to settle when the purchaser attended at the appointed hour with the balance purchase moneys. The purchaser terminated the

³ [1982] Qd R 145.

⁴ At p 151-152.

⁵ [1983] 1 Qd R 526.

⁶ Ibid at p 528-529.

⁷ [1989] 1 Qd R 295.

contract. An offer to tender an hour and forty five minutes after the agreed time was too late.

- [12] In *Re Ronim Pty Ltd*⁸ the relevant terms were the same as in *Lowe v Evans*. The parties had agreed upon a place and 3.30 pm on the settlement date for completion. On the settlement date, the electronic search of the land title register was not working. The parties discussed extension. The buyer said it intended to settle and requested that the settlement appointment time be deferred to 5.00 pm. The buyer arrived a few minutes after 5.00 pm. The Court of Appeal held that did not comply with the agreement as to settlement, either as to the appointed time of 3.30 pm or between the hours of 9.00 am and 5.00 pm, saying “If, as here, the parties have created an apparently rigid framework, then the court must respect, not disregard, the underlying intent”.
- [13] The difference between clause 6.1 in the present case and the terms in *Lowe v Evans* and *Re Ronim* is critical. The time of day for settlement is excluded from the essentiality of time under clause 6.1.
- [14] *Aussie Invest Corporation Pty Ltd v Pulcesia Pty Ltd*⁹ was a Victorian case which considered whether a party is entitled to settle outside normal hours on a date fixed under a notice to complete, which makes time essential under an open contract. Dodds-Streeton J held that ordinarily “where only a date is specified, the hour fixed for settlement is a matter of convenience”. However, “it is ultimately a matter of construction of the particular documents in each case”.
- [15] Thus, in *Jeppesons Road Pty Ltd v Di Domenico & Anor*¹⁰ the contractual provisions were clauses 5.1, 5.3 and 6.1 of the standard terms of contract, like the present case. The buyer failed to tender the balance purchase price at the nominated time on the settlement date. Arrangements were made to settle later in the day before 5.00 pm. The buyer did not attend with the balance purchase price by 5.00 pm. The seller purported to terminate. However, at that time the seller did not have one of the documents it was required to exchange for the balance purchase price under cl 5.3(1). The Court of Appeal recognised the effect of *Re Ronim*, and considered the requirement that at the appointed time a party be ready willing and able to settle, referring to *Ireland v Leigh* and other cases. They distinguished between a case where the seller is at no time on the settlement date ready to settle and a case where “at some earlier time on the due date for settlement, the necessity for the provision of [a document]...had become apparent and, although the vendor could not then tender performance, it was able to remedy that deficit before the expiration of the time for settlement”¹¹.
- [16] Thus, under cl 5.1(1) of the standard terms of contract things are quite different if the seller or buyer is unable to complete by 5.00 pm. In that case, the seller or buyer who fails to be ready for settlement in time may well be charged with breach of contract if their attendance was not excused or waived by the other party.
- [17] But where the question is one of late attendance at the nominated time for settlement of the seller or seller’s encumbrancer who is to deliver the release of an

⁸ [1992] 2 Qd R 172.

⁹ [2005] VSC 362; (2005) 13 VR 168.

¹⁰ [2005] QCA 391.

¹¹ Eg *Lohar Corporation Pty Ltd v Dibu Pty Ltd* (1976) 1 BPR 9177 at 9184.

encumbrance in exchange for payment in part of the balance of the purchase price,¹² neither conveyancing practice nor clause 6.1 of the standard terms of contract requires that the seller or buyer be able to carry out their obligations to complete the contract at settlement within five minutes of the agreed time, when that would still be before 5.00 pm.

- [18] As Muir JA said in *Mullins v Kelly-Corbett*: “the premise that time was of the essence in respect of the time fixed for settlement... is wrong. Under clause 6, time was of the essence of the contract ‘except regarding any agreement of the parties on a time of day for settlement’”¹³.
- [19] In the present case, 25 September 2012 was the settlement date. The sellers’ solicitors nominated the offices of an agent of the mortgagee, SAI Global, at Southport as the place of settlement and 3.00 pm as the time for settlement. They also expressly stated: “Notwithstanding that a specific time, date and place for settlement is arranged... any such arrangement shall be deemed tentative, and we reserve our client’s right to effect settlement at any time on the day appointed pursuant to the terms of the contract”.
- [20] The buyer (by its solicitor’s clerk) attended the place of settlement which had been agreed between the parties at the appointed time but refused to remain more than five minutes after that time. Because of the failure of the sellers’ encumbrancer’s representative to be at that place at 3.00 pm, the sellers were not ready to settle at 3.00 pm, as they did not then have the instrument necessary to release any encumbrance over the property in compliance with the sellers’ obligation in cl 7.2.
- [21] The buyer’s solicitor’s clerk announced that she had been instructed to leave at 3.05 pm if the sellers were not ready. She did not tender the balance purchase price and it was at no stage proved that the buyer was able to settle. She left the place for settlement at 3.05 pm, notwithstanding the intimation that the encumbrancer’s representative would be there within 10 or 15 minutes and that settlement could then proceed. Further, at about 3.10 pm the sellers’ solicitor requested the buyer’s solicitor to ask his clerk to return to the settlement. The buyer’s solicitor said that he would get instructions. The buyer’s solicitor neither agreed that the buyer would return to the settlement nor did the buyer do so or attempt to make any other arrangement.
- [22] That was not a discharge of the buyer’s dependent, concurrent and reciprocal obligation to make an exchange of payment of the balance purchase price in accordance with clauses 5.1, 5.3 and 6.1 of the standard terms of contract.
- [23] In contrast, the sellers’ failure to be ready precisely at 3.00 pm was not a breach of their dependent, concurrent and reciprocal obligation to complete the contract in accordance with those clauses, because they were ready to do so within 20 minutes or so.
- [24] By making time of the essence of the contract except regarding any agreement between the parties on the time of day for settlement, each of the parties agreed to the risk of breach of contract if they were not able and therefore not ready and willing to complete on the agreed settlement date between the hours of 9.00 am and 5.00 pm.

¹² See also s 69(2)(b) of the *PLA*.

¹³ [2010] QCA 354 at [38].

- [25] But there was no agreement and no practise by which each of them also agreed to the risk of being in breach of contract if they were, as in this case, late for the agreed time of day for the settlement by 20 minutes where the time was still between 9.00 am and 5.00 pm and they would be ready to settle within those hours.
- [26] At 4.36 pm the sellers' solicitor sent a facsimile to the buyer's solicitor. The facsimile asserted that settlement had not taken place because of the buyer's inability to instruct its solicitors to settle with funds at 3.00 pm. It continued: "As a consequence your client is in fundamental breach of the contract of sale as settlement was not effected before 5.00pm as a result of your client's inability to settle and we reserve our rights."
- [27] The buyer correctly contends that the facsimile was sent too early. It was not yet 5.00 pm. The buyer was not yet in actual breach of the contractual term requiring settlement by 5.00 pm. The buyer contends that the facsimile was an intimation to the sellers that they need not settle the contract after 4.36 pm and thereby excused them from doing so. The buyer further contends that by the facsimile the sellers renounced their prior indication that they had reserved their rights to settle at any time up to 5.00 pm and thereby negates a finding that the sellers were ready and willing, including able, to settle before 5.00 pm. Neither of these contentions were made at the hearing of the application before the primary Judge. The buyer sought leave to raise them on appeal. In my view, the contentions should be rejected, in any event. It is therefore unnecessary to consider whether leave should not be granted because they were not raised in the Court below.
- [28] The buyer's contention that it was excused from the obligation to settle before 5.00 pm by the facsimile proceeded from the submission that the sellers treated the contract as at an end by expressly asserting that the buyer was in fundamental breach. That contention must be rejected. The reservation of rights by the sellers was not consistent with treating the contract at an end. The sellers did not purport to elect to terminate the contract then. All they did was charge the buyer with a breach of contract which had not yet occurred, because it was not yet 5.00 pm. Nothing in the text of the facsimile or in the fact that it was sent before 5.00 pm had passed indicated to the buyer that they were not required to complete the contract by settling it by 5.00 pm.
- [29] Further, the facsimile was neither a statement that the sellers were not ready and willing to complete the contract in accordance with its terms, nor did the fact of sending it before 5.00 pm justify the inference that the sellers were not ready and willing to complete. On the contrary, by not responding to the seller's solicitors request made at 3.10 pm to return to settlement and by not making or attempting to make any other arrangement for settlement to occur before 5.00 pm, the buyer prevented the sellers from being able to tender performance of their obligations at settlement and thereby excused the sellers from being required to do so.
- [30] Accordingly, in my view, the buyer's failure to exchange the payment of the balance purchase price in accordance with cll 5.1 and 5.3(1) of the standard terms of contract by 5.00 pm on the settlement date was an actual breach of contract by the buyer.
- [31] Further, the buyer's failure or refusal to settle at any time after 3.05 pm on the settlement date prevented and excused the sellers from performing their obligations

at settlement by tendering in accordance with the requirements of cl 5.3(1) of the standard terms of contract.

- [32] Thus, the buyer was in breach of contract in failing to settle and that breach was a breach of an essential term because time was of the essence under cl 6.1. The sellers were ready and willing to complete the contract in accordance with its terms.
- [33] Accordingly, after 5.00 pm on 25 September 2012, the sellers were entitled to terminate the contract under cl 9.1(1) for the buyer's failure to comply with an essential term as well as being entitled to do so at common law for breach of contract. However, they did not do so.
- [34] Instead, on 17 October 2012, the sellers started a proceeding claiming an order for specific performance, thereby electing to affirm the contract and to keep it on foot. Even so, by the day of the hearing of the originating application seeking that relief, on 1 November 2012, the buyer was resisting an order for specific performance¹⁴ and had not indicated any preparedness to complete the contract. This delay was a "continued long failure to complete"¹⁵.
- [35] On 1 November 2012, at or shortly before the hearing of the application, the sellers elected to terminate the contract.¹⁶ Based on the buyer's continued long failure to complete, and absent any intimation of a change of position by the buyer, they were entitled to do so in the face of the buyer's refusal to be bound by the contract and repudiation. Thereafter, they proceeded with the application for the declarations that were made by the learned primary Judge.
- [36] Having terminated the contract at common law, the sellers were entitled to forfeit the deposit and any interest earned.
- [37] It follows that the declarations made by the learned primary Judge were rightly made for the reasons which he gave.
- [38] I would dismiss the appeal with costs.

¹⁴ See the buyer's outline of submissions at [5].

¹⁵ *Ogle v Comboyuro Investments Pty Ltd* [1976] HCA 21; (1976) 136 CLR 444 at 458.

¹⁶ T 1-2.20-40.